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No. 85-308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANDERSON COUNTY, TENNESSEE
and
STATE BOARD OF EQUALIZATION OF TENNESSEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The government opposes the granting of the petition for a writ of certiorari arguing that the decision below merely applies state laws. It chooses to ignore the questions presented by petitioners and misstates the case.

Contrary to the government's statement in its Memorandum for the United States in Opposition, this case does not concern an *ad valorem* real property tax on a "manager's interest" in a federally-owned atomic energy plant. Opp. 1. This case involves the imposition of a Tennessee real property tax on Union Carbide Corporation, an independent contractor of the United States, whose use and possession of a government-owned plant for its own commercial purposes gave Carbide a taxable real property interest separate from the government's fee interest in the plant.

The government ignores the issue of fraud upon the federal district court perpetrated by its contractor, the government's participation in that fraud, and the benefits received by the government from that fraud.

Further, the government avoids the question of the misplaced reliance of the Court of Appeals for the Sixth Circuit on the doctrine enunciated by this Court in *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941), to render that fraud "immaterial." Rather, the government faults the petitioner for having failed to seek a review of the Tennessee Supreme Court's opinion, which the government erroneously asserts "is merely a straightforward application of state law as authoritatively construed by the highest court of the state." Opp. 2.

What the government ignores in making that statement is that the Tennessee Court of Appeals —in reversing the Chancery Court's affirmation of the Tennessee State Board of Equalization's ruling that Carbide was subject to a real property tax—considered itself bound under the Sixth Circuit's decision in *United States v. Anderson County,* 705 F.2d 184 (6th Cir., *cert. denied,* 104 S. Ct. 548, 1983), by the federal district court's interpretation that the interest contractually conveyed to Carbide was a mere license [not a lease] for Carbide's use of the government plant, and that the Tennessee state courts' sole function was to apply Tennessee law to determine the taxability of the license. The Tennessee Supreme Court specifically affirmed the court below and construed state law within the confines permitted by the federal ruling. Pet. App. A–23.

Thus the only orderly procedure available to the petitioners was to seek a review of the federal district court's interpretation that Carbide's contract conveyed a mere license, which decision had been successfully obtained through proceedings flawed by Carbide's fraud upon the district court and the participation of the government in that fraud.

The government in its memorandum does not deny any of the facts on which petitioners base their allegations of fraud upon the federal district court. Rather, the government seeks to avoid any discussion of the fraud by incorrectly asserting that petitioners do not challenge directly the ruling of the lower court that such facts are rendered "immaterial" by the Tennessee Supreme Court's decision. Opp. 2.

Question III of the petition specifically places before this Court the question of whether the Sixth Circuit correctly applied the *Vandenbark* doctrine when the decision of the state's highest court was itself controlled by a prior federal court's decision in parallel proceedings. Moreover, unlike *Vandenbark,* here parallel proceedings were instituted, directed and financed in the state and federal courts by a single party, the government. Further, the district court's decision, which was binding on the Tennessee Supreme Court, is flawed by the fraud of the contractor in which government participated. Pet. 23–28.

The government applies a broad brush citing the finality of prior court decisions in an attempt to obfuscate the underlying inequity to petitioners arising from the fraud on the district court. The opinion rendered by the federal district judge in these parallel proceedings was critical in the state proceedings.

Thus, the petitioners are left with a situation in which the government is arguing in these flawed proceedings that the petitioners should be denied any review of these issues despite the fact that the Tennessee Supreme Court felt itself bound by the federal district court and the Court of Appeals for the Sixth Circuit in turn felt itself bound by the decision of the Tennessee Supreme Court.

CONCLUSION

For these reasons and the reasons set forth in the petition, a writ of certiorari should issue to review the judgment and the opinion of the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of October, 1985, sent a true and exact copy of the Reply to Memorandum for the United States in Opposition by first class mail, postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C., 20530.

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